requires compensation under Section 910(a) when a claimant worked more than 75% of the workdays in the preceding year. That contention reflects a misreading of the court of appeals' decision. The Ninth Circuit did not hold that Section 910(a) must be applied in all cases in which an employee has worked at least 75% of the workdays. That court has expressly recognized that, even when an employee has worked at least 75% of the workdays, Section 910(a) does not apply when the nature of the claimant's work is seasonal or intermittent, *Price*, 382 F.2d at 884, when there is insufficient evidence in the record to enable the ALJ to make an accurate calculation under Section 910(a), *ibid.* or potentially in other special circumstances. *Matulic* v. *Director, OWCP*, 154 F.3d 1052, 1057 (9th Cir. 1998). At the same time, the court acknowledged that ALJs may apply Section 910(a) even "when the claimant has worked less than 75% of these days, if the reduction in working days is atypical of the worker's actual earning capacity." Pet. App. 22 (internal quotation marks omitted).

In this case, the court of appeals found that Castro worked 77.4% of the workdays in the year preceding his injury. Pet. App. 26-27. Petitioners presented no evidence that the nature of his employment was seasonal or intermittent, that an accurate calculation could not be made under Section 910(a), or that there was any other special circumstance that would make it unfair or unreasonable to apply Section 910(a). The Ninth Circuit therefore applied Section 910(a) in this case not because it invariably applies that subsection when a claimant worked at least 75% of the workdays of the preceding year, but because petitioners offered no persuasive reason that Section 910(a) should not apply given the facts of this case.

To the extent that petitioners object to any reliance on a percentage figure in determining whether Section 910(a) applies, that objection is misguided. The text of Section 910(a) expressly provides that its method of calculation applies not only when a claimant worked the entire year preceding the injury, but also when the claimant worked "substantially the whole of the year." 33 U.S.C. 910(a). In making a determination whether a claimant has worked "substantially" the whole of the year, a court must necessarily consider the percentage of days that the employee worked. And using a particular percentage figure as a rule of thumb to determine what is "substantially" the whole of the year eases administration of the statute and is consistent with the approach that the Court has adopted in other contexts. See *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 371 (1995) (concluding, as an appropriate rule of thumb for the ordinary case, that a worker who spends less than 30% of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act (Merchant Marines Act of 1920, ch. 250, 41 Stat. 988)).

Congress's specification that Section 910(a) applies when a worker has worked "substantially" the whole of the year also answers petitioners' argument that the court of appeals' approach leads to overcompensation. By making Section 910(a) applicable when an employee has not worked the entire year, but only "substantially" the whole year, Congress clearly contemplated some degree of overcompensation. As the Fifth Circuit has explained, overcompensation "is built into the system." See *Gulf Best Elec., Inc.* v. *Methe*, 396 F. 3d 601, 606 n.1 (2004). And petitioners have not shown that a 75% figure departs so far from the customary hours worked in

the industry that it produces more overcompensation than Congress could have intended.

b. In any event, review of the first question presented is unwarranted because no other circuit has taken a position on whether the court of appeals' approach in this case best implements the LHWCA. Although the Seventh, Fifth, and Fourth Circuits have not adopted an approach like that of the Ninth Circuit (see Pet. 10-12), neither have they rejected such an approach. And their holdings are consistent with the Ninth Circuit's decision below.

Petitioners contend that the decision below conflicts with *Strand* v. *Hansen Seaway Service, Inc.*, 614 F.2d 572 (7th Cir. 1980). There is, however, no conflict. In that case, the Seventh Circuit applied Section 910(c), rather than Section 910(a), to a claimant who worked 84% of the available workdays in the preceding year because the court found the claimant's employment to be "seasonal." *Id.* at 574-576. That holding is consistent with the Ninth Circuit's approach, because the Ninth Circuit has expressly held that Section 910(a) does not apply to "seasonal" employment." *Price*, 382 F.3d at 884 (citing *Marshall* v. *Andrew F. Mahoney Co.*, 56 F.2d 74, 78 (9th Cir. 1932)).

In arguing that *Strand* conflicts with the decision below, petitioners rely (Pet. 11) on a statement of the court below that its decision in *Matulic* rejected *Strand*. Pet. App. 25. But that statement cannot transform consistent decisions into conflicting ones. The fact remains that both the Seventh Circuit and the Ninth Circuit apply Section 910(c), rather than Section 910(a), to seasonal employment, and petitioners have not identified any case in the 25 years since *Strand* was decided in which the Seventh Circuit has applied the statute to

non-seasonal employment in a way that is in conflict with the decision below.

Contrary to petitioners' contention (Pet. 12), the Fifth Circuit's decision in *Methe* also does not conflict with the Ninth Circuit's approach. In that case, the Fifth Circuit held that the ALJ erred in applying Section 910(c) rather than Section 910(a), where the claimant worked 91% of available workdays the year preceding the injury, and the only objection to applying Section 910(a) was that it would lead to overcompensation. 396 F.3d at 606-607. That holding is consistent with the decision below, because the Ninth Circuit would have reached the same conclusion. Although the Fifth Circuit did not adopt the Ninth Circuit's precise approach, it did not reject that approach either. *Id.* at 606. Indeed, the Fifth Circuit expressly relied on the Ninth Circuit's observation in *Matulic* that Congress intended for Section 910(a) to apply in most cases even though it results in overcompensation. 396 F.3d at 606 n.1.

Petitioners similarly err in contending (Pet. 12) that the decision below conflicts with the Fourth Circuit's decision in *Baltimore & Ohio R.R.* v. *Clark*, 59 F.2d 595 (4th Cir. 1932). In that case, the Fourth Circuit applied Section 910(c), rather than Section 910(a), because it concluded that the claimant's work was intermittent and discontinuous, and because the claimant worked only 48% of the workdays in the previous year. *Id.* at 599 (prior year's earnings were $527.30, or 48% of the full-year earnings). That holding does not conflict with the Ninth Circuit's approach, because the Ninth Circuit would not apply a presumption in favor of the application of Section 910(a) to a claimant who worked only 48% of the workdays in the preceding year.

2. Petitioners contend (Pet. 13) that the court of appeals erred in holding that Castro could receive an award of total disability benefits for the time he spent participating in a Department of Labor-approved vocational rehabilitation program. That contention is without merit and does not warrant review.

The LHWCA distinguishes between partial and total disabilities, but it does not define the difference between the two. Filling that gap, the court of appeals reasonably concluded that a claimant who is enrolled in a rehabilitative program and can demonstrate that participation in the program precludes him from engaging in otherwise suitable employment may receive total disability benefits for the duration of the program. The LHWCA provides that "[t]he Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange * * * for such rehabilitation." 33 U.S.C. 939(c)(2). It is consistent with that directive and the rehabilitative goals of the Act to conclude that an employee may receive a total disability award for the period during which the claimant's participation in a rehabilitative program precludes him from accepting alternative work.

The decision below is consistent with the holdings of the only two other courts of appeals that have addressed the issue. In particular, both the Fourth and Fifth Circuits have held that employees who are receiving vocational rehabilitation services may be given a total disability award when participation in the program renders the claimant unavailable for employment. *Newport News*, 315 F.3d at 292-296 (4th Cir.); *Louisiana Ins.*, 40 F.3d at 127-128 (5th Cir.).

Petitioners contend (Pet. 14-15) that, under the Court's decision in *Potomac Electric Power Co.* v. *Direc-*

tor, OWCP, 449 U.S. 268 (1980), Castro's eligibility for an award of partial disability under the schedule precludes any alternative recovery. Petitioners' reliance on *Potomac Electric* is misplaced. In that case, the Court held that when a claimant is entitled to partial disability benefits for a scheduled injury, the claimant may not elect to recover benefits for a *partial* disability based on the claimant's lost earning capacity. *Id.* at 273-274. That holding has no application here, because Castro is seeking to recover for a *total* disability, not a partial disability. As the Court explained in *Potomac Electric*, "since the § 8(c) schedule applies only in cases of permanent partial disability, once it is determined that an employee is totally disabled the schedule becomes irrelevant." *Id.* at 278 n.17; see *Norfolk Shipbuilding & Drydock Corp.* v. *Hord*, 193 F.3d 797, 802 n.4 (4th Cir. 1999); *DM & IR Ry. Co.* v. *Director, OWCP*, 151 F.3d 1120, 1122 (8th Cir. 1998).

Petitioners similarly err in contending (Pet. 16) that Castro's injury did not cause his inability to work during vocational rehabilitation. Castro's injury caused his need for vocational rehabilitation, and while in vocational rehabilitation, he could not participate in alternative work. Moreover, Castro participated in an OWCP-approved program, and did so because it gave him the best long-term earning potential. Pet. App. 83. In those circumstances, Castro's injury was a cause of his inability to work. In any event, that fact-bound question does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2005

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No. 05-371

DEC - . 2005

In The
Supreme Court of the United States

GENERAL CONSTRUCTION CO., ET AL.,

Petitioners,

v.

ROBERT CASTRO, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT CASTRO IN OPPOSITION TO PETITION FOR CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals erred in adopting a rule that an ALJ cannot resort to the broad discretion of § 10(c) of the Longshore Act to fix the worker's "average annual earnings" (on which compensation rates for disability and death under the Act are based), instead of following the arithmetic formula provided by § 10(a) or (b), solely because the worker has been employed for somewhat less than the idealized numbers of days of work per year on which the calculation prescribed by § 10(a) or (b) is based, and in establishing 75 percent of those numbers of days as the upper limit of work in the year preceding the injury for which resort to § 10(c) may be warranted based on the missed work alone.

2. Whether the court of appeals erred in approving the administrative construction of §§ 2(10) and 8 of the Longshore Act, according to which a worker is totally "incap[able] because of injury to earn [any] wages" during a period in which, although he or she could otherwise perform some available work, he or she is engaged in a course of vocational retraining, too intensive to allow concurrent employment, which the delegate of the Secretary of Labor has determined to be appropriate to the worker's situation under § 39(c)(2) of the Act and its implementing regulations.

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BRIEF ROR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Robert Castro hereby urges the Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW AND JURISDICTION

Petitioners accurately recite the reportage of the opinions below and the bases on which this Court's jurisdiction is invoked.

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act[1] is the only federal private-sector workers'-compensation law.[2] Its benefit provisions are based closely

[1] Act of Mar. 4, 1927, c. 509, 44 Stat. 1424, *as amended*, 33 U.S.C. §§ 901-50 ("Longshore Act").

[2] The Act's own "coverage" is now limited principally by the requirement that the injured worker have been "engaged in maritime employment." *Id.* § 2(3), *as amended*, 33 U.S.C. § 902(3); *see, e.g., Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297 (1983); *Chesapeake & Ohio R. Co. v. Schwalb*, 493 U.S. 40 (1989). Its application has been extended to other types of employment, however, by the Defense Base Act, 42 U.S.C. §§ 1651-54; the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b); and the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§ 8171-73. (Its former application to private employment in the District of Columbia (District of Columbia Workmen's Compensation Act of 1928, 45 Stat. 600) has been supplanted by District "home-rule" legislation since 1982 (*see generally, e.g., Railco Multi-Construction Co. v. Gardner*, 902 F.2d 71, 73-74 & nn.2-4 (D.C. Cir. 1990).)

on those of state laws on the same subject; it imposes no-fault liability on the employer, for medical benefits and for periodic benefits for disability or death caused by injuries "arising out of and in the course of employment" and by occupational diseases. Longshore Act §§ 2(2), 3(a), 7-9, 33 U.S.C. §§ 902(2), 903(a), 907-909. As a general proposition, the Longshore Act forecloses tort remedies against an insured employer, and also recovery from a vessel owner or operator (whether or not it is the employer) based on "unseaworthiness," for injuries within its coverage. *Id.* § 5(a), (b), 33 U.S.C. § 905(a), (b).

Periodic compensation for disability or death under the Act is based (subject to upper and lower limits established by §§ 6(b) and 9(e), 33 U.S.C. §§ 906(b), 909(e)) on the worker's "average weekly wage" – one fifty-second of his or her pre-injury "average annual earnings" as determined under § 10(a), (b), or (c), 33 U.S.C. § 910(a)-(c) (set out at Pet. App. 96). For *total* disability, whether temporary or permanent,[3] weekly compensation is fixed at two-thirds of

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[3] Petitioners' description of the grid of classes of disability (temporary or permanent, total or partial), Pet. 4, is incorrect in several respects. Temporary-total- or -partial-disability status, for example, does not depend on whether the recovering injured worker "is expected to recover and return to *full* employment," *id.* (emphasis added), but only on whether he or she is expected to recover *some* substantial earning capacity that is then lacking. More importantly, in contradistinction to Social-Security-disability law, in workers'-compensation law generally and under the Longshore Act in particular, it is not simply whether the injured worker is able or "unable to *perform* any gainful employment," *id.*, that determines the extent of disability, but rather whether he or she is able to perform *and can reasonably compete for and obtain* such work in his or her local labor market. *E.g.*, *Roger's Terminal & Shipping Co. v. Director, OWCP*, 784 F.2d 687, 690-91 (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988); *Palombo v. Director, OWCP*, 937 F.2d 70, 73-75 (2d Cir. 1991); *See v. Washington Metropolitan Area*

(Continued on following page)

the average weekly wage, payable so long as such disability continues. Longshore Act § 8(a), (b), 33 U.S.C. § 908(a), (b). For *partial* disability, whether temporary or permanent but "unscheduled," it is two-thirds of the difference between the "average weekly wage" and the disabled worker's residual weekly "wage-earning capacity" as determined under section 8(h) of the Act, likewise payable indefinitely (except for a five-year maximum for *temporary* partial). *Id.* § 8(c)(21) (set out at Pet. App. 94), (e). But for *permanent partial* disability that is "scheduled" – i.e., that results entirely from an injury to a member or faculty listed in the "schedule" of impairments in § 8(c)(1)-(19) of the Act (total or partial loss, or "loss of use," of a listed member or faculty) (set out at Pet. App. 91-93) –, compensation is at the full rate of two-thirds of the pre-injury average weekly wage for the fixed period applicable under the schedule.[4]

2. On November 20, 1998, while descending from a crane in the course of his employment with Petitioner General Construction, Respondent Robert Castro slipped and fell, tearing the anterior cruciate ligament in his right knee. *E.g.*, Pet. App. 66.[5] After a period of recovery including three surgical procedures, he was left upon achievement of

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Transit Authority, 36 F.3d 375 (4th Cir. 1994); *but cf. Rivera v. United Masonry, Inc.*, 948 F.2d 774 (D.C. Cir. 1991) (effect of injured worker's undocumented-alien status on availability of alternative work should be disregarded).

[4] As one would expect, the overwhelming majority of "scheduled"-injury cases involve a "partial loss of use" of a scheduled member or faculty, for which the period of compensation is the "proportional" part of the figure fixed by § 8(c)(1)-(14). *Id.* § 8(c)(18)-(19).

[5] Unless otherwise indicated, the citations herein for the relevant facts are to the ALJ's decision (Pet. App. 63-88).

his maximum medical improvement in August 2000 with reduced range of motion (both flexion and extension) in the knee joint and muscle atrophy. *Id.* at 66-67. Both Castro's treating physician and the doctor engaged by Petitioners to examine his condition agreed that the restrictions imposed by this impairment effectively ended the career as a pile-driver carpenter in which Castro had engaged since 1973. *Id.* at 66, 67-68. Physicians engaged by both sides variously rated the "permanent impairment" of his right leg under the American Medical Association's *Guides to the Evaluation of Permanent Impairment* at from 10 percent to 35 percent.[6] *Id.* at 67-70 & n.4.

Petitioners initially paid Castro compensation under the Act for temporary total disability at a rate based on an average weekly wage of $988.62 (Pet. App. 76). In July 2000, however, they initially indicated that his continuing payments would be reduced to a $500-a-week wage basis, but eight days later reinstated payments based on a "recalculated" wage of $756.65 (*id.*). Upon his achievement of "maximum medical recovery" shortly after his third surgery, in August 2000 (*id.* at 68), Petitioners instituted payments at that rate for scheduled permanent partial disability, and continued such payments for a period of 48.97 weeks, appropriate to its examiner's rating of 17-percent

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[6] Use of the degree of "permanent impairment" under the regime of the *AMA Guides* as the degree of "partial loss of use" under LHWCA § 8(c)(19) is not provided for by the Act's schedule, which incorporates the *Guides*' methodology only with respect to hearing loss and impairments resulting to retirees from delayed-onset occupational diseases (§§ 8(c)(13)(E), 8(c)(23), 2(10)); but such use is common, and was assumed to be appropriate, to the extent a "scheduled" award for permanent partial disability is appropriate, in the proceedings below in the present case.

impairment of the leg (*id.* at 67 n.4). Castro had attempted unsuccessfully to return to work for General Construction in June-July 1999 (*id.* at 66); he did so again, in a lighter-duty capacity, after his August 2000 release from medical treatment, but the duties of even that work were beyond his impaired capacity, and the treating physician opined that he should seek vocational retraining (*id.* at 68).

Meanwhile, in December 1999-January 2000 and between June 2000 and April 2001, Petitioners had Castro's job-placement potential evaluated by vocational consultants, who identified a number of unskilled light-duty jobs, paying $8 to $10 an hour, in the greater-Seattle area, whose requirements were approved as appropriate by Castro's physician and Petitioners' consulting physicians (Pet. App. 70-72). Although Castro tried to follow up on some of the identified positions, he found that they were either unavailable or too far away from his home on Bainbridge Island, making the commute impractical (*id.* at 73, 74).

The local office of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), exercising the authority of the Secretary of Labor under § 39(c)(2) of the Longshore Act, 33 U.S.C. § 939(c)(2), to direct vocational rehabilitation, developed a retraining plan for Castro. After evaluation of his skills, knowledge, aptitudes, physical limitations, and interests, and his high motivation to develop an alternative career, the vocational counselor engaged by the OWCP recommended a retraining plan for a career in hotel-motel management, which involved a two-year course of study at a local community college (Pet. App. 73-74). The local OWCP district director (the statutory "deputy commissioner," *see* Longshore Act § 40; 20 C.F.R. § 701.301(a)(7), set forth at Pet. App. 97)

adopted that plan, over Petitioners' objections, without acceding to Petitioners' demand for a hearing before an ALJ on the appropriateness of the plan; and Petitioners did not appeal the adoption of the plan to the Benefits Review Board (*id.*; *see also id.* at 36-37, 52-55 & n.9 (Board decision); *id.* at 5 n.1 (court of appeals)). Castro began courses in September 2000, and was scheduled to complete the program in June 2002 (*id.* at 74; *see also id.* at 34 (Board decision)). The program required work in an "internship," whether paid or unpaid; qualifying paid positions were "very rare," and although Castro secured such a position that was supposed to pay $7.75 an hour, he was unable to sustain it and resigned after working only 80 hours in order to keep up with his course work (*id.* at 75, 83 n.9).[7]

3. Castro claimed that Petitioners' compensation payments had been based on a lower average-weekly-wage basis than appropriate; that the degree of his loss of use of his leg was greater than the 17 percent for which Petitioners had paid; and that he should be paid for total disability during the period of his OWCP-sponsored and -approved retraining program (Pet. App. 65). In a May 2002 decision following a June 2001 hearing, a Department of Labor administrative law judge ("ALJ") credited the 17-percent

[7] Petitioners' recitation (without benefit of citation to the record) that Castro "had already worked" at that job for over 80 hours at the time of his testimony before the ALJ, Pet. 7, is potentially misleading. It is likely that the result below would have been different if the record bore out the natural signification of this phrase. The ALJ, however, credited Castro's testimony that he was unable to keep up with his class work while so employed and accordingly gave it up after only about 80 hours' work.